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VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Written *Ex Parte* Presentation by AmeriFactors Financial Group, LLC
CG Docket Nos. 02-278 and 05-338

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Federal Communications Commission's ("FCC's" or "Commission's") rules, the undersigned counsel for AmeriFactors Financial Group, LLC ("AmeriFactors") hereby submits this letter concerning AmeriFactors' Petition of Expedited Declaratory Ruling filed July 13, 2017 in the above-captioned proceedings ("Petition"). The Commission received comment on the AmeriFactors Petition in August and September of 2017, and the Petition is ripe for resolution.

In this submission, AmeriFactors submits additional information in the form of a white paper addressing the First Amendment arguments made by AmeriFactors.[1] The attached white paper explains the relevant case law applicable to the facsimile provisions of the TCPA and the significant technological changes that have occurred since the constitutional issues have last been addressed by the Commission.

[1] AmeriFactors Financial Group, LLC, Petition for Expedited Declaratory Ruling, at 29-31, CG Docket Nos. 02-278 and 05-338, filed July 13, 2017 ("Petition").

Background

In its Petition, AmeriFactors urged the Commission to declare that "fax" advertisements the recipient receives through online facsimile services or on a device other than a "telephone facsimile machine" are not subject to the Telephone Consumer Protection Act of 1991 ("TCPA"). In 1991 when the TCPA was first enacted, the justification offered for the restrictions on speech that would necessarily follow was the need to prevent the shifting of advertising costs from the sender to the recipient. With the fax technology at the time, facsimile messages were received by a traditional stand-alone fax machine. Thus, the statute makes it unlawful "to use any telephone facsimile machine, computer, or other device to send, ***to a telephone facsimile machine***, an unsolicited advertisement."[2] While many types of devices could originate a fax under the statute (reflecting the notion that any device might use fax protocols), the statute lists only one type of device that is relevant on the receiving end – the "telephone facsimile machine." Yet, the Commission in its pronouncements in 2003 and 2015 stretched this clear and unambiguous phrase to an illogical conclusion, blurred the lines between a "computer or other device," on the one hand, and a facsimile machine, on the other hand, and found that facsimile messages that are received on fax servers are also prohibited under the TCPA.[3] Opponents of AmeriFactors' Petition have argued that these pronouncements control the question of cloud-based online fax services as well. AmeriFactors disputes opponents' statutory analysis.

The Commission's 2003 and the Bureau's 2015 Orders' Interpretations of "Capacity" Have Been Refuted by ACA International v. FCC

The principal basis for the Commission's 2003 ruling and the Bureau's 2015 application of that ruling are that fax servers have the "capacity" to transcribe text or images to paper, ***if connected to a printer;*** therefore, they too are "telephone facsimile machines" under the TCPA.[4] Such a decision however ignores the clear dichotomy between the first and second clause of the TCPA – one in which a "computer" is listed when discussing the equipment that

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2 47 U.S.C. § 227(b)(1)(C) (emphasis added).

3 *Rules and* Regulations *Implementing the Telephone Consumer Protection Act of 1991,* Report and Order, 18 FCC Rcd 14014, 14133 (¶ 200) (2003) (hereinafter the "2003 TCPA Report and Order"); *Westfax,* Inc. *Petition for Consideration and Clarification,* Declaratory Ruling, 30 FCC Rcd 8620, 8623(¶ 10) (CG Bur. 2015) (hereinafter the "Westfax Order").

4 2003 TCPA Report and Order at 14134; Westfax Order at 8624 (¶ 11).

originates a fax and one in which "computer" is omitted when discussing the equipment that receives a fax.[5] It further ignores the fact that a computer is not a "telephone facsimile machine" simply because it has the "potential" to be connected to a printer. In 1991, Congress surely was aware that computers could be connected to a printer and were, in most (if not all instances), actually connected to a printer. Nevertheless, Congress did not include computers within the scope of a "telephone facsimile machine."

Of note, since the filing of AmeriFactors' Petition, the D.C. Circuit Court of Appeals held in *ACA International v. FCC* that the Commission's interpretation of "capacity" as it relates to the definition of an automatic telephone dialing system ("ATDS") to include any device that had the "potential functionality" was unreasonable.[6] First, as the D.C. Circuit noted in its opinion, these provisions do not necessarily or automatically morph with changes in technology:

> Congress need not be presumed to have intended the term "automatic telephone dialing system" to maintain its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time. After all, the statute also generally prohibits nonconsensual calls to numbers associated with a paging service or specialized mobile radio service, yet those terms have largely ceased to have any practical significance.[7]

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5 47 U.S.C. § 227(b)(1)(C). Commenter Biggerstaff has argued that online fax servers are "telephone facsimile machines" merely because they receive transmissions in fax protocols. Reply Comments of Robert Biggerstaff, at 3, CG Docket Nos. 02-278 and 05-338, filed Sept. 1, 2017 ("The systems that receive fax transmission via the fax protocols are – each and every one of them – a 'telephone facsimile machine' as defined by the TCPA"). This argument obliterates Congress' careful distinction among the types of equipment covered by the statute. If merely using facsimile protocols makes a piece of equipment a "telephone facsimile machine" then every "computer or other device" using fax protocol also is a facsimile machine and the different language in the two clauses of Section 227(b)(1)(C) is meaningless. Biggerstaff's focus on the use of facsimile protocols must, therefore, be rejected.

6 885 F.3d 687, 695-700 (D.C. Cir. 2018).

7 *Id.* at 699 (internal citations omitted).

Further, *ACA International* criticized the approach that the Commission took in defining "capacity" without considering whether the capability was used in relation to the challenged phone call or even if the required capability had been activated. The reach of the statute became especially pronounced upon recognizing that under the Commissions' approach in that order, an uninvited call or message from a smart phone violated the statute *even if the auto-dialer feature is not used*.[8] The Commission's approach completely eliminated any consideration of causation with a strict liability statute that resulted in huge potential judgments unrelated to any actual damages.[9] Although the D.C. Circuit explicitly did not decide the "causation" issue, that issue clearly influenced the court's skepticism regarding the overbroad definition of "capacity."[10]

The *ACA International* court also found the Commission's definition of "capacity" arbitrary and capricious because its reach included virtually all smartphones that were used by the end of 2016 by almost 80% of American adults as smartphones could download a simple application that would allow the phone to use an ATDS function.[11] The court found that the FCC's interpretation of "capacity" was so broad to be an "unreasonable and impermissible expansive" determination.[12]

ACA International is instructive to the Commission in the AmeriFactors Petition as well, because the core "capacity" question is similar. The present approach toward "capacity" vis-à-vis facsimile machines is invalid for the same reason as the D.C. Circuit found in *ACA International*. As with the ATDS issue, virtually any computer would be a "telephone facsimile machine" under this theory because all computers have the "capacity" to be virtually connected

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8 *Id.* at 697. (emphasis added).

9 Some courts justify the $500 minimum damage scheme as justified on the grounds that the actual damages which are recoverable are hard to calculate or prove. That is clearly not the case. Actual damages are not hard to prove if they are non-existent or occur at a frequency to be undetectable. We are unaware of any litigation (excluding one default judgment) where the actual damages were larger than the statutory minimum.

10 *See* 885 F.3d at 703-704.

11 *Id.* at 697.

12 *Id.* at 700.

to a printer.[13] And the overbroad interpretation of "capacity" is even worse in the context of the fax provisions of the TCPA because section 227(a)(1)(C) includes computers in the sending mode, but not the receiving mode.[14] Thus, modern telecommunications equipment cannot be included within the definition of a "telephone facsimile machine" simply because they are capable of being connected to printers. The possibility of harm from faxes received on other devices "if they are printed" is not consistent with the statute.

To the Extent WestFax Declares Online Fax Services to be "Telephone Facsimile Machines" WestFax Was Wrongly Decided

In 2015, the Consumer and Governmental Affairs Bureau (Bureau) issued a declaratory ruling and concluded that an "e-fax" "is covered by the consumer protections in the [TCPA] and Junk Fax Prevention Act."[15] Some have argued in this proceeding that the *WestFax Order* already addresses the type of services raised in the AmeriFactors Petition, a conclusion with which AmeriFactors disagrees. But even if *WestFax* did address online fax services, its analysis is wrong and should be rejected by the Commission. *WestFax* suffers from two major, and ultimately fatal, flaws.

First, even though *WestFax* was decided twelve years later, it does not address changes in technology that had occurred since 2003. In 2003 the FCC was presented with the question as to whether the TCPA applies to fax servers.[16] The FCC concluded that "faxes sent to personal computers equipped with, or attached to, modems and to computerized fax servers are subject to the TCPA's prohibition on unsolicited faxes."[17] The FCC clarified that "the prohibition does not extend to facsimile messages sent as e-mail over the Internet."[18] In 2003, unlike today, fax modems were directly connected to computers – think dial up computers

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13 Indeed, even a smartphone, which simply is a small, special purpose computer, could be a telephone facsimile machine because smartphones can connect via Bluetooth and other technologies to printers.

14 47 U.S.C. § 227(a)(1)(C).

15 Westfax Order, 30 FCC Rcd at 8623 (¶ 10).

16 2003 TCPA Report and Order at 14133 (¶ 200).

17 *Id.*

18 *Id.*

accessing AOL. The 2003 order did not address e-faxes or cloud technology, which obviously did not exist at that time.

Twelve years later, the Bureau, when faced with the question of the application of the TCPA to e-faxes performed no independent analysis of the issue, did not analyze the present market conditions or current technology, but instead adopted the 2003 TCPA Report and Order almost entirely, including all of it rationale based on year-2000 technology.[19] That fact alone renders *Westfax* inapplicable to 2019 technology underlying the AmeriFactors petition. Thus, to the extent there is any argument that a new, fresh review of the current technology is not needed because it was done in the *Westfax Order*, that argument is entirely wrong.

Second, *Westfax* applied a skewed interpretation of an end-to-end communication. The Bureau in *Westfax* stated: "The TCPA applies to a fax that is sent as a fax over a telephone line to a device that meets the statutory definition of 'telephone facsimile machine,' which, as discussed above, is the case here. There is an end-to-end communication that starts when the faxed document is sent over a telephone line and ends when the converted document is received on a computer."[20]

The "end-to-end" rule is a method employed by the FCC to determine whether communications are interstate for the purposes of 47 U.S.C. section 201.[21] This jurisdictional analysis has no application to determining whether the TCPA also covers fax messages that are sent to online fax servers. And, the application of the end-to-end analysis to issues beyond jurisdictional questions has been rejected by the D.C. Circuit.[22] In *Bell Atlantic Telephone Companies*, the D.C. Circuit essentially chastised the FCC for applying a jurisdictional doctrine to decide a policy question without explanation.[23] *Westfax* failed to explain how the fact that a transmission may have originated on a covered device (a facsimile machine, computer or other

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19 *See generally* Westfax Order.

20 Westfax Order at 8623 (¶ 10).

21 *Core Comm'ns, Inc. v. FCC*, 592 F.3d 139, 144 (D.C. Cir. 2010); *see also United States Telecom Ass'n v. FCC*, 825 F.3d 674, 730 (D.C. Cir. 2016).

22 *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1, 6 (D.C. Cir. 2000) ("Here [the Commission] used the [end-to-end] analysis for quite a different purpose, without explaining why such an extension made sense in terms of the statute or the Commission's own regulations.").

23 *Id.* at 7-8.

device) is relevant when the transmission is converted to a different format before delivery to the recipient. It also fails to explain how the alleged end-to-end transmission bears on whether the receiving device is a "telephone facsimile machine" as defined in the statute. In short, the *Westfax Order* does little to address the key questions that must be addressed.

The AmeriFactors White Paper

Just as the D.C. Circuit cautioned the FCC in *ACA International*, the FCC cannot presume that "telephone facsimile machines" will exist in perpetuity. When technology has changed, the FCC must acknowledge that change. It is undeniable that facsimile technology has changed tremendously since 1991 when the TCPA was enacted, and has changed materially since 2003, the last time the Commission addressed the question of fax servers. Those changes bear upon the straightforward statutory interpretation questions before the Commission. Separate from the statutory interpretation, they also have an impact on the constitutionality of the TCPA provisions, if they are determined to apply in the situations AmeriFactors describes.

AmeriFactors submits this White Paper to demonstrate the impact that technological changes since 1991 have on the constitutionality of the fax provisions of the TCPA. Those provisions undoubtedly are content-based restrictions, in that they apply only to unsolicited "facsimile advertisements" and do not apply to non-advertising speech. If the Commission were to conclude in this proceeding that the TCPA's fax provisions reach messages received by recipients through online facsimile services, then significant constitutional concerns would be raised and the Commission would be required to address the constitutionality of the restrictions. In the attached White Paper, AmeriFactors explains why an interpretation that online fax services are within the scope of the TCPA would not be supportable under the First Amendment.

Sincerely,

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